

¹ When claimant's accidental injury occurred, her last name was Snyder. She has since married and her last name is now Houston.

Respondent argues the ALJ's Award should be affirmed.

The issues for the Board to address are:

1. What is the nature and extent of claimant's disability?

a. Did claimant sustain a scheduled injury to the right lower leg only, or did she also sustain permanent injury to her lumbar spine, thus converting the injury to the body as a whole?

b. What is claimant's permanent impairment of function?

c. If claimant sustained a general bodily disability, should she be awarded work disability benefits?

FINDINGS OF FACT

Claimant's job for respondent, a manufacturer of bombs, was a line worker in production. Her job required her to stand, lift items weighing up to 70 lbs., bend, stoop and handle explosives. Claimant testified: "There's a line and then you like trade off in different positions like inspecting, like lifting bombs on to the table, screwing on fuses."²

On March 1, 2007, claimant was being evacuated from the building in which she was working due to a risk of an explosion created by a bad fuse. She described her accident: "Well, as we were walking across the field through grass that was maybe knee high, couldn't really tell where you were going and I stepped in a hole and fell."³ Claimant alleged injuries to her right hip, right shoulder and right ankle.⁴

On approximately May 3, 2007, claimant was sent to respondent's plant physician, Dr. Donahey, to whom claimant complained of right ankle pain and swelling. Dr. Donahey prescribed steroid tablets and placed claimant's right ankle in a brace. Dr. Donahey referred claimant to Dr. Brad Meister, an orthopedic surgeon. Claimant's right ankle was placed in an air cast. Following a right ankle MRI scan, Dr. Meister recommended surgery.

Claimant continued to work for respondent until July 2007, when she was permanently laid off by respondent. Claimant has not worked since her lay off.

² Houston Depo. at 5.

³ *Id.* at 7.

⁴ *Id.* at 10.

Claimant testified that since the accident she experienced an altered gait that caused low back symptoms. The record is unclear when claimant's low back symptoms commenced.

Dr. Steven Howell, a board certified orthopedic surgeon who specializes in feet and ankles, evaluated claimant on August 28, 2007, on referral from Dr. Meister. Dr. Howell's records do not document any low back or right shoulder complaints,⁵ although claimant testified she told Dr. Howell that, in addition to right ankle pain, she had right shoulder and back pain.⁶

Dr. Howell ordered diagnostic tests and ultimately performed surgery on November 19, 2007. The procedure consisted of "a posterior tibial tendon reconstruction consisting of removing an accessory navicular with an FDL transfer and a medialization osteotomy of her calcaneus and Achilles lengthening on her right foot."⁷ Claimant received post-operative care from Dr. Howell until she was released at maximum medical improvement on December 30, 2008. Dr. Howell restricted claimant from prolonged sitting and standing.

In August 2009 claimant returned to Dr. Howell with complaints of right lower extremity pain and numbness. There were no low back complaints. Dr. Howell ordered a lumbar MRI scan and lower extremity EMG/NCV testing. The MRI revealed disk degeneration and facet arthrosis at L4-5 and L5-S1, but no disk herniation or foraminal stenosis. The EMG/NCV tests were negative for nerve compression.

Dr. Howell testified claimant's neuritic-type symptoms and pain could be associated with her diabetes as well as her obesity:

Q. So am I correct in understanding then, Doctor, with regards to your opinions, there are other factors that could give rise to the complaints that she expressed to you in August, 2009 and continuing to September, 2009, none of which are associated with the foot injury or injury to the foot and any alleged altered gait. Would that be true?

A. I believe so.⁸

⁵ Howell Depo. at 8-9; Ex. 2.

⁶ Houston Depo. at 10.

⁷ Howell Depo., Ex. 3 at 1.

⁸ *Id.* at 13-14.

Dr. Howell opined that an altered gait does not cause back pain in the majority of individuals, although he did agree claimant had an antalgic gait. Based on the *AMA Guides*,⁹ Dr. Howell rated claimant's permanent impairment of function at 10% to the right lower extremity.

Claimant admitted she received no authorized treatment for her right shoulder and low back complaints.¹⁰

Dr. Edward Prostic, a board certified orthopedic surgeon, evaluated claimant on April 17, 2009, at the request of her attorney. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Prostic noted claimant wore a right ankle brace and favored her right leg, resulting in an antalgic gait.

Based upon the *AMA Guides*, Dr. Prostic rated claimant's impairment to the right lower extremity at 25% due to the posterior tibial tendon reconstruction, calf atrophy and weakness. On March 9, 2010, Dr. Prostic issued a report in which he opined claimant's symptoms of paresthesias in the right lateral leg were not related to the March 1, 2007 accident.

Claimant returned to see Dr. Prostic on April 15, 2011. Dr. Prostic noted claimant walked with an abnormal gait. Dr. Prostic opined claimant had symptoms of tarsal tunnel syndrome and might need surgery. Permanent restrictions were imposed.

Claimant reported no back symptoms to Dr. Prostic at either examination.

In a report dated May 10, 2011, Dr. Prostic changed his rating of claimant's permanent functional impairment by adding an additional rating of 10% to the body as a whole for claimant's low back. The 25% lower leg and back ratings combined under the *AMA Guides* to be a 19% functional impairment to the whole body.

Dr. Prostic opined claimant's abnormal gait and abnormal body mechanics due to her right leg injury aggravated her preexisting disease and caused low back pain with radicular complaints. Dr. Prostic found no objective evidence of ongoing radiculopathy.

Dr. Prostic reviewed the list of claimant's former work tasks prepared by vocational counselor Jerry Hardin and concluded claimant could no longer perform 48 of the 65 tasks, for a 74% task loss.

⁹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

¹⁰ Houston Depo. at 34, 39.

Mr. Hardin interviewed claimant on September 8, 2011, at the request of claimant's attorney. He prepared a task list of 65 tasks claimant performed in the 15-year period before his injury. Mr. Hardin reviewed Dr. Prostic's medical reports and restrictions and opined claimant is essentially and realistically unemployable in the open labor market.

Dr. Vito Carabetta, board certified in physical medicine and rehabilitation, evaluated claimant on January 30, 2012, at the request of respondent's attorney. Claimant complained of pain in her lower back and right ankle. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Carabetta diagnosed status-post right ankle tendon surgery for ligamentous insufficiency and mechanical low back pain with radicular complaints.

Dr. Carabetta opined: "Within a reasonable degree of medical certainty, her subjective complaints of low back pain with radiating symptoms into the right lower extremity do not appear to be a direct result of the March 1, 2007 accident that affected her right ankle."¹¹

Based on the *AMA Guides*, Dr. Carabetta rated claimant's permanent functional impairment at 15% to the right lower extremity. Dr. Carabetta testified:

Q. And what were your conclusions concerning the low-back complaints?

A. Essentially she has subjective complaints of low-back pain with right sciatica, all of which are constant and unimproved. These complaints are symptoms that she finds now to be her primary issue. The examination failed to demonstrate objective findings in terms of the lower back. She was neurologically intact. She had an MRI scan of the lumbar spine that essentially demonstrated expected limited degenerative changes.

She did not respond to the approaches that were pursued for this in terms of the epidural blocks, as would make sense in that she did not have an active lesion in the lower back for which that sort of approach would be beneficial. The electrodiagnostic study she had failed to show evidence of lumbar radiculopathy.

. . . .

What I found more troubling was -- in reviewing the records carefully, was that she was seen by Dr. Prostic in the middle of 2009 and at that point still had not reported the low back pain. Obviously, Dr. Prostic in this position was one who was supposed to be in her corner and would be expected to report any and all subjective complaints. They weren't presented in that report, and I find that quite odd.

. . . .

¹¹ Carabetta Depo., Ex. 2 at 3-4.

And so we have subjective complaints, which I am not going to disagree that she has, but at the same time, we have neither objective foundation nor a causation factor that is clearly established.¹²

Regarding claimant's altered gait, Dr. Carabetta testified:

She does have the altered gait issue at hand. However, an altered gait pattern, though it can cause low-back pain, you should have some objective findings on the examination. In this case they should be there essentially at all times in that she has constant low-back pain, and, in addition, you would've expected that the altered gait would have within the first few months triggered the low-back pain, rather than not being present in documents that were authored more than two years later.¹³

Dr. Carabetta opined that claimant did not have a permanent impairment to her low back caused by the work injury.

Claimant is currently being treated by her family physician, Dr. Denise Huskey, with prescription pain medication. Claimant received epidural steroid injections from Dr. Bradley Davis, a physiatrist to whom claimant was referred by Dr. Huskey. Claimant continues to experience low back pain and right ankle pain and numbness. She is receiving social security disability benefits.

PRINCIPLES OF LAW AND ANALYSIS

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.¹⁴

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits.¹⁵ "Burden of proof" means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹⁶

¹² *Id.* at 11-13.

¹³ *Id.* at 14.

¹⁴ K.S.A. 2006 Supp. 44-501(a).

¹⁵ *Id.*

¹⁶ K.S.A. 2006 Supp. 44-508(g).

The Act recognizes two different classes of permanent injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent general bodily disability.¹⁷ In determining whether a claimant sustained a scheduled or a non-scheduled disability, it is the situs of the resulting disability, not the situs of the trauma, which determines the workers compensation benefits available.¹⁸ If the situs of the disability is to the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, the disability is considered scheduled.¹⁹

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.²⁰ The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.²¹

Claimant did not satisfy her burden to prove permanent impairment to the low back. She is entitled to PPD based on a 20% impairment to the right lower leg. Claimant is not entitled to an award of work disability.

The reasons claimant is not entitled to a general bodily disability include:

1. There is no evidence claimant reported low back or radicular complaints to either Dr. Donahey or Dr. Meister, the first two health care providers seen by claimant following the accident.

2. Contrary to her testimony, claimant did not complain of low back pain to Dr. Howell, the physician who performed claimant's surgery. In 2009, Dr. Howell investigated the cause of claimant's symptoms of right lateral leg parasthesia, but neither the lumbar MRI scan nor the EMG testing demonstrated any neurological involvement due to the accident.

3. Dr. Howell's opinions cast doubt on the notion that claimant's low back complaints or right lower extremity symptoms were caused, contributed to or aggravated by her

¹⁷ K.S.A. 44-510d; K.S.A. 44-510e.

¹⁸ *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

¹⁹ K.S.A. 2006 Supp. 44-510d(a)(13).

²⁰ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

²¹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

accidental injury or her altered gait. Dr. Howell's rating is limited to the right lower extremity.

4. Claimant was examined, at the request of her own attorney, by Dr. Prostic on two occasions. On neither occasion were there documented low back complaints. Dr. Prostic expressed the opinion that claimant's complaints of right leg parathesia were unrelated to her accident.

5. Dr. Prostic's opinions about the causal relationship between claimant's post accident altered gait and her low back pain are entitled to little weight. Dr. Prostic's idea that claimant's low back pain was related to her altered gait seems improbable when claimant made no complaints of back pain at either one of Dr. Prostic's examinations.

6. Also bearing on Dr. Prostic's credibility is his change of opinion regarding claimant's permanent impairment between his first and second examinations. After his first examination, which occurred over two years after claimant's accident, Dr. Prostic limited his rating to the right lower extremity. If claimant developed impairment of function to the low back due to limping, it would likely have manifested itself by two years post injury.

7. Dr. Carabetta's opinions are entitled to greater weight. Dr. Carabetta testified that if claimant developed low back complaints due to an altered gait, such complaints would have occurred within the six month to one year period after the accidental injury.²² As noted by Dr. Carabetta, there was no documentation of low back complaints in the medical records predating his examination on January 30, 2012.

8. In Dr. Carabetta's opinion, claimant's low back complaints are unrelated to her accident. He limits his impairment rating to the right lower extremity, as did Dr. Howell.

9. Claimant received no authorized medical treatment for her low back, nor is there evidence that any issue of claimant's entitlement to low back treatment came before the ALJ at a preliminary hearing. If claimant had low back pain, the Board would expect her to at least try to obtain authorized medical treatment.

CONCLUSIONS OF LAW

1. As a result of claimant's accident, she sustained a scheduled injury to the right lower leg. Claimant did not prove permanent impairment to her lumbar spine and is not entitled to benefits based on a general bodily disability.

2. Claimant's permanent functional impairment is 20% to the right lower leg.

²² Carabetta Depo. at 26-27.

3. Claimant is not entitled to a work disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.²³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the Board's decision that the Award of ALJ Thomas Klein dated June 12, 2013, is affirmed in all respects.

IT IS SO ORDERED.

Dated this 31st day of October, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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²³ K.S.A. 2006 Supp. 44-555c(k).